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FAMILY THEORY

Vol. 1

PROFESSOR ROGERSON

Faculty of Law
University of Toronto

1985-86

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This set of readings presents some ideas about families and family law that are designed to spark discussion and inquiry. The goal is to explore attitudes and policy approaches towards the family, and to think about their implications in legal terms. Rather than focus on a few problems to be finally 'laid to rest', the materials are designed to give an impression of the complexity of the problems associated with the family. Any coherent approach should deal with all these problems, and the lack of any underlying vision in the current law can be seen in its varied response to the issues. The law is in a state of transition from an older view of the family to a new one, which is as yet undetermined. While it might be argued that the law is only responding to the search for a new social consensus on attitudes towards the family, law can be an important factor in forging that consensus. Hence, it is important to develop a policy alternative, and to decide how it can be legally implemented.

The materials are divided into four separate segments. The readings in each section are prefaced by a short note introducing the theme they are organized around. The four topics covered, one by each section, are: perspectives, family as a unit, sexual division of labour and its relation to capitalist society, and children in the family. The last three segments are organized in a similar, tri-partite, fashion. First, there is a series of abstract theoretical readings explicitly concerned with the main theme. This is followed by a more detailed, but still theoretical, analysis of a particular problem which is implicitly related to the broader topic. These analyses will make extensive use of the perspectives introduced in the first segment of the materials. Finally, an attempt is made to present some possible legal responses to the problems that have been discussed.

There are a few things that should be kept in mind when working through each segment. First, this is a course about law (although the readings don't always reflect it). In the end the question is always: how do the ideas presented help to evaluate the current legal regime, and what do they imply about the nature of future reform? In addition to using theory to evaluate law, law and social facts can be used to test theoretical perspectives, both for accuracy and for practical potential. Second, this is a course about families. The materials are drawn primarily from sources which, in their concentration on relations between the sexes, tend to adopt a particular view of the family. Their model focusses on (relatively) autonomous, adult (but not old), responsible individuals. Our model of the family should be richer, including all members of all families (e.g. children, and elderly couples), and encompassing a variety of family forms. As well, when dealing in practical legal terms, one might wish to consider alternatives to such reductionist viewpoints. However, this does not mean that the fundamental question, whether the family is an appropriate unit to use in the legal system, can be avoided. Third, this is a seminar course, and the readings are presented only as starting points. You are not expected to master their details, nor consider all the implications they may have. Criticism is an essentially uncreative task. There is far more to be gained from trying to shape your own thoughts about the family or some particular problem, and (hopefully (in both senses of the word)) to articulate these notions in general discussion.

Family Theory

Vol. I

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I Perspectives

(a) Introduction

The first section of the materials briefly surveys a variety of perspectives on family law; the historical, economic, functionalist, political and feminist. The ideas generated within these frameworks will dominate these materials on the family. The overview is designed both to familiarize you with the focus and style (read "jargon") of discussion, and to delineate the spectrum of opinion within each viewpoint.

The readings about each of the five perspectives are similarly organized. They begin with a thumbnail sketch of the basic point sought to be made by people who adopt that framework. A more detailed analysis follows, one which attempts to categorize more finely, and which explores the subtle variations on the basic theme. Finally, some short examples of work within that perspective are included, in order to give some feeling for the way in which debate is carried on.

The first two readings, however, do not discuss particular points of view at all. Respectively, they point out the value of using the insights of a variety of disciplines to understand the family, and the important role of law in seeking answers to social problems. Of these two points the latter is perhaps the most important to keep in mind when reading for this course. Most of the arguments presented will discuss only general social change, rather than legal strategies for achieving broader goals. Thus, the problem of designing appropriate laws in light of these arguments remains. The first article is included as a veiled plea to consider all frameworks dispassionately (but critically) and use them as tools to form and modify an approach to the family. As well, the first article describes the importance of the family in social terms and the tremendous potential, both positive and negative, that lies within it. Our task is to combine the study of the family as a social institution and as a legal concept that these two excerpts exemplify in order to realize this potential.

II The Family as a Unit of Affection

(a) Introduction

The most pervasive image of the family in popular culture is that of an altruistic combination of individuals fulfilling each other's emotional needs; an image commonly conveyed by Christopher Lasch's description of the family as a "haven in a heartless world". The family is also thought to be the basic social institution. When these two ideas are joined the result is a notion of marriage as a "status", hence a multitude of consequences flow from a public commitment to mutual affection. From tax acts, to welfare entitlements, to evidence, virtually all areas of the law have special rules dealing with family relationships which are based on a recognition of the special emotional bonds involved. This section of the materials provides a framework in which to consider some of the questions raised by this view of the family.

The first problem is how children are accommodated within this vision. As there is another section of the materials concentrating on children and the special nature of the parent-child relationship, this topic is not dealt with by these readings. Instead they will focus on the spousal relationship and marriage as a source of personal fulfillment. You may want to keep in mind, however, a concern frequently voiced that the primacy now accorded the spousal relationship operates to the detriment of children. Next come the linked questions of the justification for state intervention and the validity of having a family "status" govern outcomes in a variety of situations. If marriage is a voluntary personal union then (the argument runs) it should have only private, not public consequences, and the general approach of the state should be one of non-intervention. Finally, the accuracy and significance of this vision can be questioned. Is the most important aspect of family interaction emotional support and dependance, either from an empirical viewpoint, or when trying to formulate policy? Does the concept of state non-intervention in the private sphere of the family make sense?

The first article challenges this perception of the family and argues that there are several dimensions to family interaction. The state of the relation in one area, the emotional, has, and should have, no necessary effect on the relation in other areas. Family law should respond flexibly and differentially in each sphere to reflect the action situation. The second article is a historical account of subtle changes in the popular view of the family. While one of the described variants is implicit in most writing about the family, only historians, in their attempt to differentiate it from previous relationships, have analysed the "companionate marriage".

Two areas of legal regulation which are connected to the broader theoretical issue are then considered. Unmarried cohabitation is a good topic to begin with, since it provides an opportunity to consider the shape of an ideal family law. The relation involved seems to be the same as that in marriage, but there is no tradition of state intervention into these unions (except to prohibit them). Therefore new rules must be more fully jus-

tified, and policy makers must construct the theoretical basis for state intervention from the ground.

The second topic is that of domestic violence. The empirical data presented challenge the traditional image of the family as affective unit. State intervention to combat violence must isolate individuals within the family. Not only does this come into conflict with the notion of the family as a private unit, it can also clash with the practical reality of unity in areas other than the emotional (particularly the economic) as Dickens points out.

III Capitalism and the Family: The Sexual Division of Labour

(a) Introduction

The "traditional family" that has attracted so much criticism in the last few decades, particularly from feminists, has a breadwinner-husband and a homemaker-wife. This sexual division of labour is mirrored by women's position in the waged workforce, where they tend to be concentrated in low-paying jobs similar to the tasks they perform in the home (e.g. nursing, primary school teaching, and working in textile industries). The division of labour has also proved remarkably intransigent, for even as women leave home for work there is much evidence that they continue to shoulder the lion's share of the domestic burden. The next set of materials investigates the relationship between the larger, capitalist social structure and this fact of the sexual division of labour within the family (eschewing to a great extent the broader question of that division in the whole of society). The two main questions to be asked are: What are the reasons for the empirical phenomenon, and, in particular is the division of labour inevitable in a capitalist society? and; In what ways does the capitalist welfare state and social security system support the sexual division of labour, and can we reform its institutions in order to eliminate this support? One preliminary observation that must be made with regard to all these materials is that, more than for many other topics, there has been dramatic change recently and the experience of societies varies geographically. Therefore, chose attention must be paid to the time and place in which the authors are writing.

The introductory articles all attempt to answer the first of these questions, each from a different perspective. Corresponding to these perspectives are different understandings of the fundamental base of the problem and different strategies for reform. The debate centres around which of these strategies should be adopted. However, at a deeper level the analyses of the problem reflect various views of what the important functions of families are, and enrich our understanding of that institution.

The second set of readings focuses on the housewife and the value of that role. Two principal issues emerge from the discussion. First, how valuable are the type of services performed by a homemaker? Second, what should be our response to housewives: to provide some recompense for their efforts, or to remove any economic incentive for fulfilling that role? The answer to the second turns on the answer to the first, for only if a homemaker is thought to be making an important contribution does some form of reward make sense. However, the issue is complicated by the facts of current social and family structure. Even if the goal is to discourage engaging in homemaking as a fulltime activity, justice demands that the claims of women who have previously alone so be considered.

A complete picture of the economic consequences of the traditional division of labour within the family and appropriate responses requires an examination of relationships that extend beyond those between family members to the economic relationship between families and the larger society.

The next two sections explore the responses of the state (through social security) and the workplace (through paid employment) to the division of labour within the family, and, in particular, to the caring functions traditionally performed by the homemaker.

The section on the family and the welfare state raises the issue of whether the social security system does or can remedy the problems of the sexual division of labour and economic dependancy within the family. Conflicting arguments are made about the relation between social security laws and the family. Some see the welfare state as providing a source of security separate from the family. Gradually ties within the family and the functions of support and caring it performs are being replaced by ties between the individual and the state from which support is taken. The articles question whether this encouragement of individualism is desirable, and, even if desirable, whether it has actually occurred. To those concerned with the sexual division of labour the important aspect of entitlements is that they are seen to be distributed according to an underlying view of the appropriate activities of the two sexes. They feel that this provides incentives to retain traditional family structures, and reinforces female dependancy on men.

The final set of readings compensates, to some extent, for the negative view of housework and the economic dependancy of the homemaker that has gone before. Accepting the existence and importance (for the foreseeable future) of waged work in a capitalist society, the impracticality of expecting a major expansion of state provided benefits, and affirming the value of the nurturing activities that have devolved on women in the family, the articles consider ways to reform the workplace in order to accomodate men and women who are involved in those activities. Promoting parental leave and increasing the attractiveness of part-time work are two particular goals the law can seek as part of a larger restructuring. The question that remains to be answered, posed by the earlier discussion, is whether seeking such incremental change is worthwhile, or merely diverts resources from the struggle for more radical reform.

